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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRONE ROSENBLAD TAY,

Defendant and Appellant.

A132382

(Sonoma County
Super. Ct. No. SCR594687)

Appellant Tyrone Rosenblad Tay, codefendant Boonlack Chanpheng, and others were charged with murder in count 1, participation in a street gang in count 2, and kidnapping in count 3. As to count 1, it was alleged that the offense was committed for the benefit of a street gang and that a principal personally used a firearm. As to count 3, a street gang enhancement was also alleged.

Appellant pled no contest to count 3 and admitted the gang enhancement. The People dismissed the remaining counts.

Appellant was sentenced to a term of 8 years on count 3, and a consecutive 10 years for the gang enhancement, for a total of 18 years in state prison.

Codefendant Chanpheng also entered a no contest plea to the same charges and was sentenced to state prison for a total of 15 years. Chanpheng also appealed his conviction, which was affirmed in full in *People v. Chanpheng*, A137663 (unpub. Op., Jan. 28, 2013). A summary of the facts is taken from that opinion:

“Vutha Au, the victim, was a subpoenaed witness in a case involving members of the Asian Boyz gang. He was shot nine times and killed in the early morning hours of

March 2, 2008. Earlier the previous evening, Tay and another man had driven Au to downtown Santa Rosa. When Tay parked the car, four Asian Boyz members pulled up and forced Au into their car. He was taken to Blind Beach, where he was shot and killed by a member of the group. Tay and appellant [Chanpheng] had exchanged text messages earlier in the evening concerning the plan to kill Au. Appellant [Chanpheng] and Tay were active members of the Asian Boyz gang.”

1. *The trial court did not err in denying appellant’s motion to quash/suppress and traverse the search warrants.*

Appellant contends the trial court erred in denying his motion to quash and traverse the search warrants. We do not agree.

Where, as here, it is claimed that material misstatements or omissions were made, the trial court reads the affidavit as it should read, and then retests for probable cause. This is precisely what the trial court did under *Franks*. (*Franks v. Delaware* (1978) 438 U.S. 154; see also *People v. Thompson* (2006) 38 Cal.4th 811.) As the trial court stated, “But the real issue at hand is excluding that information [any misstatement]. . . . Adding any [omission] that was not included the first time and you arrive at the statement of probable cause and I think it’s still sufficient as a matter of law.”

The “corrected” statement of probable cause established that appellant was a member of the Asian Boyz Gang; that the victim Au was scheduled to testify against the gang members; that the suspects had allegedly kidnapped and tortured another person (the victim’s brother) who had testified against them; that shortly before the incident appellant was at a party with the suspects and celebrated the life of an Asian Boyz member who had been killed; that appellant drove the victim to a location where he met up with the suspects; that the victim was then forced to enter a car with the suspects; and thereafter was executed and left to die at Blind Beach.

These facts were clearly sufficient to establish probable cause to search appellant’s car, residence, and phone records, and to support the trial court’s denial of the motion to suppress.

2. *The trial court did not abuse its discretion in imposing the aggravated term for the kidnapping.*

The plea agreement provided that appellant could be sentenced to a maximum of 18 years, which is the sentence he received. The factors in aggravation, as set forth in the probation report, are as follows:

Rule 4.421: “The defendant’s use of cellular phone calls and texts, as well as the content of the messages, indicates planning and sophistication. [] It appears the defendant might have taken advantage of a position of trust in committing the crime, considering that he considered himself to be Vutha Au’s friend, all available evidence indicates he was essentially the link between Au and Khaoone’s group, and he willingly delivered the unsuspecting victim to the location where Khaoone and his cohorts were waiting, under the pretense of ‘going clubbing’ with Au. [] The defendant’s prior convictions as an adult and sustained juvenile petitions are numerous. [] The defendant was subject to a grant of conditional sentence when he reoffended in the instant matter. [] The defendant’s prior performance on three grants of conditional sentence and one grant of juvenile probation was unsatisfactory.”

The probation officer concluded that the aggravating factors “overwhelm” those in mitigation, and he recommended the aggregate term of 18 years. The trial court, in sentencing appellant to the aggravated term, for the kidnapping with the gang enhancement, expressed its own reasons that were consistent with the probation report.

We conclude that there was no abuse of discretion by the trial court in sentencing appellant. The judgment is affirmed.

REARDON, J.

We concur:

RUVOLO, P. J.

HUMES, J.